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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

PETITIONER'S MOTION TO MODIFY JUDGMENT

AND

BRIEF IN SUPPORT OF MOTION.

O. WALKER TAYLOR,
Attorney for the Petitioner.

L. H. Lane, Law Printer, 221 High Street, Boston.

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ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

PETITIONER'S MOTION TO MODIFY JUDGMENT.

Comes now Arthur C. Harvey Company, petitioner in the above entitled case, by O. Walker Taylor, its undersigned attorney, and respectfully and most earnestly moves this Honorable Court, in the alternative:

First: To re-examine the record and consider whether this case be not one in which it would be just and proper for this Court to modify its judgment herein by remanding the case to the District Court for a new trial or a rehearing; or

Second: To modify or amend this Court's judgment and mandate herein so as to provide that the affirmance of the judgment below is without prejudice to further proceedings in the District Court, in the form of (1) a motion for a new trial, (2) a motion for a rehearing, (3) a bill of review or (4) such other proceedings as may seem just and proper in the premises; or

Third: To grant unto the petitioner such other and further relief as to this Honorable Court may seem meet and equitable; and

Fourth: To stay the issuance of this Court's mandate herein pending the disposition of this motion.

GROUNDS FOR THE ALLOWANCE OF THE MOTION.

As grounds for the allowance of its motion the petitioner respectfully requests this Honorable Court to consider the following facts:

1. That the petitioner, by a combination of unfortunate circumstances which its counsel could not possibly anticipate, prevent or remedy, (1) has never been granted the opportunity of a full and fair trial, and (2) has been denied the right of appeal from an obviously erroneous decision of the District Court.

2. That in "so far as any rulings of law were made 'in the course of the trial', with one exception" (which was unimportant), "they were in favor of the plaintiff" and in the nature of things could not be excepted to, and made the basis of assignments of error on appeal. (See Rec. p. 24.)

3. That the District Court completely departed from all of its findings and rulings made "in the course of the trial" and decided the case "on a question which was not discussed at the hearing or noticed in the briefs" during "the course of the trial". (See Rec. p. 82.)

4. That the plaintiff was ready, able and in fact, offered to present its case in the usual, regular and orderly manner but was precluded from doing so by the admonition of the District Judge and the favorable rulings made "in the course of the trial". (See Rec. pp. 80–81.)

5. That the judgment of the District Court and the rulings contained in its written opinion (Rec. pp. 56–59) are clearly shown to be *erroneous in law* and *in direct conflict* (1) with a subsequent decision of the United States Court of Claims in which certiorari was not applied for and (2) with a decision of the Circuit Court of Appeals for the Sixth Circuit in which this Court denied a writ of certiorari.

> *Parks & Woolson Machine Company* v. *United States* (Ct. Cl.), 58 Fed. (2) 868;
>
> *Routzahn* v. *Reeves Brothers Co.*, 59 Fed. (2) 915 (C. C. A. Sixth; certiorari denied 53 S. Ct. 97).

6. That all of the findings and rulings of the District Court "in

the course of the trial" *were sound in law* and *in direct accord with* the above cited decision of the United States Court of Claims and that of the Circuit Court of Appeals for the Sixth Circuit.

7. That the published and approved rules of the District Court of Massachusetts and the uniform and long established practice of that Court and attorneys in pursuance thereof, permit a losing party to save his exceptions in a bill of exceptions, seasonably filed and approved by the Court, to any rulings of the Court made "in the absence of counsel or in writing", or, in other words, to rulings not made "in the course of the trial". (See p. 10, *infra*.)

8. That the published and approved rules of the Circuit Court of Appeals for the First Circuit do not make it mandatory that each and every error of law must be assigned but provide that "the court at its option may notice a plain error not assigned or specified". (See pp. 11–12, *infra*.)

9. That all of the holdings and rulings of the Circuit Court of Appeals on the merits of the case (Rec. pp. 63–70 and 85–87), which the opinion of this Court does not approve, are clearly erroneous as shown (1) by a previous decision of this Court in another leading case and (2) by two leading decisions of the United States Board of Tax Appeals.

American Hide & Leather Co. v. *United States*, 284 U. S. 343; 52 S. Ct. 154;
Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Coghlin Electric Co., 3 B. T. A. 1071.

10. That the case is an exceptional one involving important questions of statutory construction and appellate procedure which the opinions of the Courts below have left unsettled and in great confusion, by reason of the peculiar circumstances surrounding the case, as more fully explained in the brief in support hereof.

11. That unless relief as requested in the motion is granted, the petitioner shall have been denied a fair trial, or its day in

court, notwithstanding its honest efforts to obtain the same at great expense and inconvenience.

O. WALKER TAYLOR,
Attorney for Petitioner.

AFFIDAVIT OF COUNSEL.

COMMONWEALTH OF MASSACHUSETTS.
SUFFOLK, SS. BOSTON, MASSACHUSETTS, March 30, 1933.

Then personally appeared the above-named O. Walker Taylor, attorney at law, of Boston, Massachusetts, member of the bar of the Supreme Court of the United States, and being duly sworn deposed and said that he prepared and signed the foregoing "Motion to Modify Judgment"; that the same was prepared at the suggestion of, and with the full knowledge, consent and approval of Arthur C. Harvey Company, a corporation with a usual place of business at Boston, Massachusetts; that the facts stated as grounds for the allowance and in the brief in support of the said motion are true to the best of his knowledge and belief; that there are good, sufficient and just grounds for the allowance of the relief sought by the said motion and that the same is not filed for the purpose of delay; and that due notice of the filing of said motion has been given the Solicitor General of the United States together with three copies of said motion and brief in support thereof. Before me,

FRANK J. LINEHAN, JR.,
Notary Public.

My commission expires October 22, 1937.

BRIEF IN SUPPORT OF MOTION.

In support of the foregoing motion the petitioner respectfully submits the following:

JURISDICTION.

The jurisdiction of this Court, to grant the relief sought by the motion, is well established by precedent and the petitioner believes it has always been the policy of this Honorable Court to grant such relief in exceptional cases, where the interest of justice may require.

Missouri Pacific Railroad Company v. *Norwood*, 283 U. S. 249; 51 S. Ct. 458;
The Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643; 51 S. Ct. 587;
Insurance Company v. *Tweed*, 7 Wall. 44; 74 U. S. 65;
Flanders v. *Tweed*, 9 Wall. 425; 76 U. S. 68.
Central Surety and Ins. Co. v. *Davidson*, 46 Fed. (2) 774.

In all of the foregoing cases this Honorable Court granted some such relief, as is sought by this motion, under circumstances which, your petitioner respectfully submits, were less meritorious than the unusual circumstances presented in the case at bar. The petitioner believes, therefore, that this motion for relief is properly presented in this Court.

In the event, however, that the motion is not properly made here, or should be denied, the petitioner respectfully prays that this Honorable Court will indicate whether or not the petitioner may apply for similar relief either (1) in the District Court or (2) in the Circuit Court of Appeals, as the Court did indicate in its memoranda in the case of *Missouri Pacific Railroad Company* v. *Norwood*, 283 U. S. 809; 51 S. Ct. 652, and in that of *The Federal Trade Commission* v. *Raladam Company*, 284 U. S. 623; 52 S. Ct. 14.

ARGUMENT.

I.

ANY FAILURE OF THE PETITIONER PROPERLY TO PERFECT ITS APPEAL IN ACCORDANCE WITH SECTIONS 649 AND 700 OF THE UNITED STATES REVISED STATUTES RESULTED FROM AN UNFORTUNATE CONDITION WHICH THE PETITIONER COULD NOT REMEDY OR AVOID.

In support of this contention, the attention of this Honorable Court is called to the comments in the opinion of the Circuit Court of Appeals (Rec. p. 64), which are as follows:

> "So far as any rulings of law were made 'in the course of the trial', with one exception they were in favor of the plaintiff,' . . ."

The attention of this Honorable Court is also respectfully invited to the statements of counsel and the rulings of the District Court (Rec. pp. 80-81) which were made "in the course of the trial":

> "Mr. TAYLOR (For plaintiff). The only question and what I am trying to avoid is the attempt in this suit of counsel for the Government to repudiate that original determination and certificate of overassessment by the Commissioner, which is just what they attempted to do in the letter in which they denied our claim, and that is why I was trying to go into all that, your Honor. *I think they are going to raise the question as to which return was proper, and we are prepared and we want to put in evidence on that.*"
>
> "The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?
>
> Mr. TAYLOR (For plaintiff). Yes.
>
> The COURT (To counsel for defendants). What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK (For defendants). Yes, your Honor.

The COURT. All right.

Mr. CLARK (For defendants). The first thing that we are confronted with—

The Court. All right; I rule that Mr. Taylor has made out a prima facie case. I will hear you.

Mr. CLARK (For defendants). Would it be of any assistance if your Honor were to be informed briefly of the nature of our defense so that you might follow the case as it proceeds?

The COURT. Are you talking about 'briefly'? Considering this case has taken about 8 years, I assume it will not be brief. I will hear your defense now, briefly, or longly or in any way you want. You admit that, if the certificate of overassessment is valid, then the statute of limitations had run?

Mr. CLARK (For defendants). For collection.

The COURT. I understood you to say so.

Mr. CLARK (For defendants). That is right.

The Court. Then I rule that the allocation of part of this money which the Government had to the payment of past deficiency was wrong, and therefore Mr. Taylor has made out a prima facie case, and I will hear you for the defense.

Mr. TAYLOR (For plaintiff). Your Honor—

The COURT. I would not advise you to speak. I may change my mind as to you. 'Silence is golden', Mr. Taylor, proceed, sir.

Mr. CLARK (For defendants). I would proceed a little informally because we do not want to build too big a record on the part of the defendant.

The Court. Most court proceedings, in my judgment, when they become too formal are absolute rot. I try to get down to the issue as quickly and as far as I can. Now I will hear you." (To Mr. Clark, for defendants.)

No other rulings or findings of any consequence, except as indicated by the above colloquy, were actually made by the District Court "in the course of the trial". Thereupon, pursuant to the direction of the Court, Mr. Clark, for the defense,

offered in evidence the Certificate of Overassessment (Rec. p. 31) and the defendants' other exhibits.

The argument of the defense "in the course of the trial" was limited entirely to a discussion of jurisdiction, a question which the District Court did not rule upon, counsel for the defendant contending that the suit was based on "an allowed claim", as indicated by the Certificate of Overassessment, and should have been brought in the Court of Claims; while counsel for the plaintiff argued that the suit was properly brought against the Collector because the Commissioner of Internal Revenue had "impeached" the Certificate of Overassessment and rejected the claim for refund by his letter of December 17, 1929 (Rec. pp. 49–50).

Naturally, counsel for the plaintiff did not take or save exceptions, "in the course of the trial", to any of the District Court's rulings, because they were all in favor of the plaintiff. Nor was objection or exception made or saved to any of the documentary evidence of the defense because that was in favor of the plaintiff and proves conclusively (1) that the petitioner actually overpaid its 1918 taxes and (2) that $74,648.39 of the overpayment was credited and applied to alleged deficiencies for 1915, 1916 and 1917 which were barred by the statute of limitations.

Moreover, the above colloquy shows clearly that counsel for the petitioner was not content to rest its case at that point even though the Court had ruled (1) that the credits were "*wrong*" and (2) that the plaintiff had "*made out a prima facie case*" but was admonished by the Court "not to speak". Counsel for the petitioner accepted, at their face value, the rulings and admonition of the Court thus made "in the course of the trial", and relying thereon presented the plaintiff's sixth request for a ruling (Rec. p. 52), which might, as the Court's rulings seemed to indicate, be interpreted as embracing the gist of the plaintiff's whole case on the merits, to wit:

> "6. That upon all the law of the case the application and credit by the Commissioner of Internal Revenue and/or the defendants of the sum of $74,648.39 to the alleged underpayments of the plaintiff's income taxes for the years

1915, 1916 and 1917 constituted an overpayment which should be refunded to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928."

But the District Court did not adhere to any of its rulings thus made "in the course of the trial" or to the theory of the case as alleged in the pleadings and presented in the arguments at the trial on August 6, 1931.

In a letter dated September 8, 1931 (Rec. p. 82) the Court advised counsel for the petitioner as follows:

> "As the matter stands in my mind now I shall decide the case on a question which was not discussed at the hearing or noticed in the briefs."

The question thus referred to in the letter was as follows:

> "Whether the credit in the Harvey case is not void because under Sections 607 and 609 a refund could not be had for the taxes of the years 1915, 1916 and 1917, as no claim for refund of those taxes had ever been filed."

In its opinion (Rec. p. 59) the District Court holds:

> "In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.
>
> Judgment for the defendants."

The plaintiff could not in reason and justice be expected to take and save exceptions "in the course of the trial" to rulings so clearly in its favor. Courtesy and respect demanded that counsel for the plaintiff heed the Court's admonition that "*silence is golden*". Under the circumstances the petitioner's only recourse was to base its bill of exceptions and assignments of error upon the rulings and finding as embodied in the District Court's written opinion even though they had no connection whatever with any matter which had been argued or commented upon "in the course of the trial".

Moreover, this course of procedure, even if the District Court had adhered to its rulings "in the course of the trial", is in accordance with the long continued practice in the District

Court of Massachusetts and in the Circuit Court of Appeals for the First Circuit and is clearly permissible under the printed rules of both courts. Litigants in the District Court of Massachusetts have uniformly and over a long period of time been permitted to save their rights, in a bill of exceptions and appeal from any ruling or finding made by the Court "in the absence of counsel or in a written opinion", and to base their assignments of error thereon.

1. The pertinent rules of the District Court are as follows:

Rule 20. "Exceptions—When to Be Claimed.

No exception shall be allowed to any oral order, ruling, or decision made in the presence of counsel, unless it be saved at the time such order, ruling or decision is made. Any exception to a charge to the jury must be claimed before the jury is sent out. *Exceptions to orders, rulings and decisions made in the absence of counsel, or in writing, may be claimed and saved in a bill of exceptions filed as hereinafter provided.*" (Italics supplied.)

Rule 21. "Same—Bill of Exceptions.

Bills of exceptions to any order, ruling, or decision of the court shall be filed, and notice in writing thereof given to the adverse party within twenty days after the order, ruling or decision is made, or in case of rulings made during a trial or hearing on the merits within twenty days after the verdict of the jury or finding by the court, unless the court or judge shall otherwise order; and it or he may for good reason allow a period therefor beyond the term or after judgment. . . ."

Rule 22. "Bill of Exceptions—Allowance Before Appeal.

In actions at law, civil or criminal, rulings of the court on matters other than the pleadings cannot be reviewed on appeal, unless set forth in a bill of exceptions, filed and allowed before the allowance of the appeal."

2. The pertinent rules of the Circuit Court of Appeals are as follows:

Rule 10. "Bills of Exception—Charge to Jury—Omission of Unnecessary Evidence.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

Rule 11. "Assignment of Errors.

The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned

according to this rule will be disregarded, *but the court, at its option, may notice a plain error not assigned.* See Rule 24, section 4." (Italics supplied.)

Rule 24, Section 4.

"4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded; *but the court, at its option, may notice a plain error not assigned or specified.* See Rule 11." (Italics supplied.)

As to the matter of requests for findings of fact and rulings of law in the District Court of Massachusetts, a District Judge, sitting without a jury, seldom, if ever, actually grants or denies such requests "in the course of the trial". The requests are usually taken under advisement by the Court and are allowed or denied either (1) in the Court's written opinion or (2) in a written memorandum filed in the office of the Clerk of the Court at the time the opinion is filed. In view of this practice the parties do not take and save exceptions to the failure of the Court to pass upon written requests "in course of the trial". It is the uniform practice to save such exceptions in a bill of exceptions allowed by the Court. The petitioner respectfully submits, therefore, that in the matter of its bill of exceptions and assignment of errors everything was done to save its rights on appeal that its counsel could humanly and reasonably be expected to do, under all of the circumstances.

Despite the rules and the long continued practice in the District Court of Massachusetts, and notwithstanding the fact that no reference whatever was made to the petitioner's failure to comply with Sections 649 and 700 of the United States Revised Statutes, either in the briefs or in the oral arguments in the Circuit Court of Appeals, that Court (Rec. p. 64) commented as follows:

"It is doubtful, therefore, whether under Sections 649 and 700 R. S. any question of law is raised on the record for the consideration of this court by the appellant's assignments of error. The findings of fact are general, and no rulings of the court were excepted to 'during the course

of the trial,' which are relied on. Exceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. *Fleischmann Cons. Co.* v. *United States,* 270 U. S. 349; *United States* v. *Smith,* 39 Fed. (2) 851; *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S. 121."

Neither the *Fleischmann Cons. Co. Case,* nor any of the other cases referred to in the foregoing comments, presented such unusual circumstances as exist in the case at bar. In so far as the records in these cases reveal, the Lower Courts strictly adhered to the findings and rulings made "in the course of the trial" and counsel for the parties in those cases were not misled by the established practice and rules of the Courts and by the rulings made by the District Courts "in the course of the trial".

It is fundamental that the right of a litigant to a fair trial in the lower Court carries with it, by necessary implication, the right to his day in the Appellate Court. True, he may forfeit his right to appeal by negligence or failure to save necessary exceptions in the trial Court. The petitioner respectfully submits, however, that there is no evidence in the instant case of any such negligence. If due weight be given to the long continued practice by attorneys appearing before the District Court of Massachusetts and to Rules established by that Court, which we have quoted above, the conclusion is inescapable that the petitioner's rights were saved in respect of the erroneous ruling and conclusion of the District Judge.

It is only by ignoring the rules and the long continued practice in the District Court of Massachusetts that it can be said that the petitioner is bound by any failure properly to save its exceptions "in the course of the trial". If these rules are to be ignored or nullified and the established practice in the District Court of Massachusetts is to be disregarded, then, and then only, may it be said that the petitioner, appellant below, failed properly to take exceptions and assign errors. If the petitioner has failed in this respect the failure is due to the fact that two clear rules of the District Court have proven to

be ineffectual and the ineffectuality of the established rules of the Court itself has rendered the petitioner without remedy in respect of the erroneous rulings of the District Court and its failure to find the facts of the case as it was seasonably requested to do.

It must, therefore, be obvious that justice has been denied the petitioner unless relief can be given it by this Honorable Court or by the District Court either on a rehearing here or on a new trial in the District Court. The reason for these conclusions, as was clearly pointed out in the opinion of the Circuit Court of Appeals (Rec. p. 64) is that "during the course of the trial" the District Court consistently ruled in favor of the petitioner but after the trial "in absence of counsel" in its written opinion or decision, repudiated all of the rulings which it had made "in the course of the trial".

In applying for a writ of certiorari to this Honorable Court the petitioner was confronted with the same kind of dilemma. While the Circuit Court of Appeals stated that "it was doubtful" whether any question of law was properly before it, that Court, nevertheless, proceeded in its opinion to state all of the essential facts of the case and to pass upon and decide the case on the merits, but on an entirely different theory from that upon which the decision of the District Court rests and on matters of law and of fact which were not urged by counsel in oral arguments or in the briefs. Thus, in the petitioner's brief and oral argument before this Honorable Court counsel for the petitioner believed that any technical failure to comply with Sections 649 and 700 of the United States Revised Statutes would be disregarded and that this Honorable Court would consider the case on its merits since the Circuit Court of Appeals had done so.

The petitioner most respectfully submits, therefore, that justice has been denied the petitioner unless relief be given it in this Honorable Court, or in the District Court, either on rehearing here or by a new trial in the District Court which may be had either under the mandate of this Court ordering such new trial or under leave granted by this Honorable Court to apply for such relief either to the District Court or to the Circuit Court of Appeals, as this Court may direct.

II.

THE DECISION OF THE DISTRICT COURT IS CLEARLY SHOWN TO BE ERRONEOUS BY SUBSEQUENT DECISIONS OF THIS AND OTHER COURTS.

In its ultimate analysis the case at bar involves the interpretation of the meaning and effect of Sections 607 and 609 of the Revenue Act of 1928, 45 Stat. 874; 26 U. S. C. A. 2607 and 2609. The interpretation put upon these sections in the opinion of the District Court (Rec. pp. 56–59) is clearly shown to be erroneous by subsequent decisions of the Court of Claims and by a decision of the Circuit Court of Appeals for the Sixth Circuit in which this Court refused to grant a writ of certiorari.

Parks & Woolson Machine Company v. *United States* (Ct. Cl) 58 Fed. (2) 868;

Routzahn, Collector, v. *Reeves Bros. Co.*, 59 Fed. (2) 915 (C. C. A. 6th); certiorari denied 53 S. Ct. 97).

All of the rulings of law which the District Court actually made "in the course of the trial" were directly in accordance with the holdings of the Circuit Court of Appeals for the Sixth Circuit and that of the Court of Claims in the two cases cited above, while all of the comments and holdings in the District Court's "written opinion" are directly in conflict with those decisions. In the course of the trial, the District Court ruled and found (Rec. p. 81), that the credit of the $74,648.39 to alleged taxes for the outlawed years was "wrong", or in other words, that the credits were void under Sections 607 and 609 of the Revenue Act of 1928, *supra*. At the trial, counsel for the petitioner believed this finding and ruling of the District Court to be sound in law and of course did not save an exception to the ruling but trusted that in rendering its judgment the District Court would adhere to its own ruling thus so clearly made "in the course of the trial". In its written opinion, however, the District Court completely reverses its previous ruling and holds that the credits were "not wrong" but "valid", under Sections 607 and 609 of the Revenue Act of 1928, *supra*.

III.

THE COMMENTS AND HOLDINGS OF THE CIRCUIT COURT OF APPEALS ON THE MERITS OF THE CASE, WHILE NOT APPROVED BY THIS HONORABLE COURT, ARE CLEARLY ERRONEOUS AND IN CONFLICT, IN EVERY VITAL RESPECT, WITH APPLICABLE DECISIONS OF THIS COURT AND OF THE BOARD OF TAX APPEALS.

While this Court in its opinion did not approve the comments on the merits of the case made in the opinion of the Circuit Court of Appeals, the petitioner begs to assure this Honorable Court that it would not here seek further relief if the opinion of the Circuit Court of Appeals on the merits of the case was sound in law and in agreement with the applicable decisions of this and other Courts.

On the question of whether or not the petitioner's taxes for the six months' period ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918, as alleged in the plaintiff's declaration (Rec. pp. 4–5), or under Section 226 of that Act as alleged in the Commissioner's letter of December 17, 1929 (Rec. p. 50), the opinion of the Circuit Court of Appeals denying the petitioner's motion for reconsideration (Rec. p. 86) contains the following comments:

> "Under Sec. 205 the tax for the entire fiscal year beginning in 1917 and ending in 1918, and computed in accordance with that section, was apportioned according to the part of the fiscal year falling within each of the calendar years.
>
> Counsel contends, apparently basing his contention on some language in the opinion in *American Hide & Leather Company* v. *United States*, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917–1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which, of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.
>
> But the question of how the tax should be computed

under Sec. 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results."

As pointed out in the petition for writ of certiorari in the instant case, the foregoing comments and the method of computation illustrated in the opinion of the Circuit Court of Appeals are clearly in conflict with a leading decision of this Honorable Court as well as with leading decisions of the United States Board of TaxAppeals.

American Hide & Leather Co. v. *United States,* 284 U. S. 343; 52 S. Ct. 154;
Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Coghlin Electric Co., 2 B. T. A. 1071.

The language of Mr. Justice Stone in the *American Hide & Leather Company case, supra,* thus referred to in the opinion of the Circuit Court of Appeals, is as follows:

"Section 226 of the 1918 act authorizes the calculation of the tax for that part of the fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed,* 2 B. T. A. 84."

The comments in the opinion of the Circuit Court of Appeals on the vital question of the sufficiency of the petitioner's claim for refund and its compliance with Section 3226 of the United States Revised Statutes are equally erroneous and in conflict with one of the most recent leading decisions of this Honorable Court.

United States v. *Memphis Cotton Oil Co., decided January 9, 1933.*

The opinion of the Circuit Court of Appeals (Rec. pp. 67-68) states as follows:

> "To avoid the objection that its suit, begun in 1930, was not brought within five years of the alleged overpayment, which was in 1919, the appellant asserts that the claim filed in 1929 was only a reassertion of its claim filed in 1923; and having filed a claim for a refund within four years of the payment of the tax, and since the claim filed in July, 1929, being a reassertion of its claim filed in 1923, was disallowed, and this action was brought within two years of the disallowance, the provisions of Section 3226 R. S. were complied with.
>
> . . . . . .
>
> But a claim for a refund barred by the statute cannot be revived by filing a new claim and basing an action on its denial."

In the case of the *Memphis Cotton Oil Co., supra*, Mr. Justice Cardozo in commenting upon the effect of a claim filed out of time which merely amplified or re-asserted, before rejection, a claim seasonably filed, held that the two claims were one and the same, in the following language:

> "The function of the statute like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits *what is before him is not a double claim but a claim single and indivisible, the new indissolubly welded into the structure of the old.*" (Italics supplied.)

In view of the fact that the decision of the District Court is so clearly shown to be erroneous and that this Court did not approve the comments of the Circuit Court of Appeals in regard to the merits of the case, the petitioner respectfully submits that it is justly entitled to a rehearing or a new trial in the District Court.

IV.

IT IS ENTIRELY CONSONANT WITH THE POLICY OF THIS HONORABLE COURT TO MODIFY ITS OWN JUDGMENTS AND GRANT A REHEARING OR A NEW TRIAL IN THE LOWER COURT WHERE THE INTERESTS OF FAIRNESS AND JUSTICE REQUIRE.

As authority (1) for this Court to modify its own judgment without prejudice so as to permit further proceedings in the District Court or (2) for this Court itself to remand the case to the District Court for a retrial even though the appeal to the Circuit Court of Appeals was not strictly in accordance with Sections 649 and 700 of the United States Revised Statutes, the petitioner relies upon the five cases cited above and other cases where this Court has granted such relief as is sought by the foregoing motion.

In the case of *Missouri Pacific Railroad Company* v. *Norwood*, 283 U. S. ; 51 S. Ct. 458, this Court entertained a motion to modify its judgment and in a memorandum (283 U. S. 809; 51 S. Ct. 652) said:

> "June 1, 1931. The judgment herein (283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010) is modified so that the judgment clause will appear in the mandate as follows:
>
> On consideration whereof, it is ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed with costs without prejudice to any application to the District Court to amend the pleadings or otherwise."

In the case of *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 51 S. Ct. 587, this Court in a memorandum (283 U. S. 809; 51 S. Ct. 652) said:

> "June 1, 1931. Leave granted to file motion to modify Judgment (283 U. S. 643, 51 S. Ct. 587, 75 L. Ed. 1324) within thirty days. Term extended and mandate stayed pending disposition of the motion by this court."

While the motion in that case was denied, this Court in a memorandum (284 U. S. 623; 52 S. Ct. 14) said:

"October 12, 1931. The motion to modify the judgment of this court in this case is denied without prejudice to application to the Circuit Court of Appeals for similar relief."

In the case of *Central Surety & Insurance Co.* v. *Davidson*, 46 Fed. (2) 774, the Circuit Court of Appeals for the Tenth Circuit overruled a motion to dismiss the appeal for failure to comply with Sections 649 and 700 of the United States Revised Statutes, reversed the decision of the District Court and remanded the case for a new trial. The opinion of the Court in that case states:

"Appellee has moved to dismiss this appeal on the ground there was no waiver of a jury in writing filed before the trial of the case; therefore there is nothing for review. It is true, there was, as shown by the record, no waiver of trial by jury actually filed at the time of the trial. But clearly there must have been an agreement between counsel at the time of the trial, a jury to try the case had been waived and counsel had simply neglected to prepare and file the same of record. If not so, why, after the trial, should counsel for plaintiff have signed such a waiver and stipulated it should be filed and effective as of the day of the trial? After this was done, it would be manifestly unjust to treat the act as entirely meaningless. *Such action would not tend to promote the doing of justice in our courts. Situations somewhat akin to that which we have here are ruled in Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157, 8 S. Ct. 377, 31 L. Ed. 357, *and in Flanders* v. *Tweed*, 9 Wall. 425, 19 L. Ed. 678. *We are of the opinion the motion to dismiss this appeal on this ground should be, and is, denied.*"

. . . . . .

"*For the reasons above indicated, the judgment should be reversed, and the case remanded to the trial court for a new trial.*

It is so ordered." (Italics supplied.)

In the case of *Insurance Company* v. *Tweed*, 7 Wall. 44; 74 U. S. 665, Mr. Justice Miller pointed out the condition of the record and granted a new trial in the following language:

"The action in the case before us was brought in the Circuit Court for the Eastern District of Louisiana, on a policy of insurance, and was tried by the court without a jury. There is no bill of exceptions. There is no ruling on any proposition of law raised by the pleadings. The evidence seems to be copied into the transcript, but whether it is all the testimony, or how it came to be here, there is nothing to show. There is, in fact, nothing which a writ of error can bring here for review, tested by the rules of of the common law.

. . . . . .

We are asked in the present case to accept the opinion of the court below as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence. Besides it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment.'

But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

Upon an examination of the facts thus stated, and placing upon them that construction most favorable to the judgment of the court, we are of the opinion that it cannot be sustained.

. . . . . .

Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy, and that the judgment of the Circuit Court must be reversed, and a new trial granted."

In the other case, cited above, *Flanders* v. *Tweed*, 9 Wall. 425; 76 U. S. 68, Mr. Justice Nelson, who delivered the opinion of this Court, said :

"There having been no stipulation, nor any finding of the facts, in this case, and no question upon the pleadings, *it would follow*, according to the general course of proceeding in like cases, heretofore in this court, *that the judgment, below should be affirmed. There are, however, cases which under very special circumstances the courts have made an exception, and have* simply dismissed the writ of error, as in the case of *Burr* v. *Des Moines Co.*, 1 Wall. 99, 17 L. Ed. 561, or have reversed the judgment below for a mistrial, and *remanded it for a new trial*, as in the case of *Graham* v. *Bayne*, 18 How. 60, 15 L. ed. 265. See, also, *Guild* v. *Frontin*, Ib. 135, 15 L. ed. 290. *In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana*, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record and, under the circumstances, the case being an important one, and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial *and remand it to the court below for a new trial.*" (Italics supplied.)

CONCLUSION.

The petitioner respectfully submits that in the case at bar (1) it is apparent that the District Court and the parties below "supposed that they had made up a case" on appeal according to the established rules and practice in the District Court of Massachusetts and (2) that "under the circumstances, the case being an important one", this Honorable Court should grant the petitioner a new trial, or should give its permission for the petitioner to apply for similar relief either in the Circuit Court of Appeals or in the District Court as this Honorable Court may direct.

Respectfully submitted,

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